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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92061197
Party	Plaintiff HealthAid Limited
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Date	05/18/2015
Attachments	85080387 TTAB Response to Motion to Dismiss.pdf(21344 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re:

Mark: VITAL 3
Reg. No.: 3922987
Registered: Feb. 22, 2011

Mark: VITAL 3 JOINT SOLUTION
Reg. No.: 3973141
Registered: Jun. 07, 2011

HealthAid Limited,	Petitioner,
vs.	
Futurebiotics, LLC,	Registrant.

RESPONSE TO REGISTRANT’S MOTION TO DISMISS

In response to Registrant’s Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), and pursuant to TBMP 503.03¹, Petitioner HealthAid Limited, through its attorney Christopher J. Day, has concurrently filed a First Amended Consolidated Petition to Cancel to amplify and clarify the likelihood of confusion allegations articulated in the original Consolidated Petition to Cancel.

¹ TBMP 503.03 provides that a party may amend its pleading once as a matter of course within 21 days after service of a motion under Rule 12(b). See Fed. R. Civ. P. 15(a)(1)(B). *Caymus Vineyards v. Caymus Medical Inc.*, 107 USPQ2d 1519, 1521 (TTAB 2013). The First Amended Consolidated Petition to Cancel, as well as this Response, is filed less than 21 days after service of Registrant’s Rule 12(b) motion.

To survive a motion to dismiss, Registrant need only allege sufficient factual matter as would, if proved, establish that: (1) she has standing to maintain the claims; and (2) a valid ground exists for cancelling the registration. *See Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 187 (CCPA 1982). “For purposes of determining the motion, all of [the claimant’s] well-pleaded allegations must be accepted as true, and the [claims] must be construed in the light most favorable to [the claimant]. The pleading must be construed so as to do justice, as required by Fed. R. Civ. P. 8(e).” *Petroleos Mexicanos v. Intermix SA*, 97 USPQ2d 1403, 1405 (TTAB 2010).

Standing

The First Amended Consolidated Petition to Cancel (as did the original petition) adequately alleges Petitioner’s standing. Petitioner alleges prior use in commerce of GINKO VITAL 3 as a trademark for dietary and nutritional supplements. Petitioner has alleged that the marks in the subject registrations, namely VITAL 3—also used in connection with dietary and nutritional supplements—are confusingly similar to Registrant’s senior GINKO VITAL 3 mark. Accordingly, Petitioner has a real interest in this case, that is, a legitimate personal interest in the outcome of the proceeding and a reasonable basis for its belief in damage. Based on Petitioner’s long prior common law rights in Petitioner’s GINKGO VITAL 3 mark, Petitioner has standing to bring this action. The First Amended Consolidated Complaint (as did the original complaint) adequately alleges Petitioner’s standing.

Grounds

The First Amended Consolidated Petition to Cancel (as did the original petition) adequately alleges a likelihood of confusion basis pursuant to Section 2(d) of the Lanham Act. Petitioner has alleged prior use in commerce of GINKO VITAL 3 as a trademark for dietary and nutritional supplements. Petitioner has alleged the marks of Petitioner and Registrant are highly similar.

Petitioner has alleged that the goods of Petitioner and Registrant are identical and move in the same channels of trade. Petitioner has alleged that Registrant's VITAL 3 marks, also used for dietary and nutritional supplements so resemble the GINKO VITAL 3 mark previously used in the United States by Petitioner and not abandoned, as to be likely, when used on or in connection with the goods or services of the Registrant, to cause confusion, or to cause mistake, or to deceive.

Conclusion

Registrant's Motion to Dismiss appears to be based on the misguided notion that a junior user can moot a Petition to Cancel merely sending a letter to Petitioner withdrawing Registrant's allegation of confusion and asserting that the marks are not confusingly similar. As is made clear by the First Amended Petition to Cancel, Petitioner has properly alleged prior use in commerce of Petitioner's mark. Petitioner has alleged that Registrant's junior mark is likely, when used on or in connection with the goods or services of the Registrant, to cause confusion, or to cause mistake, or to deceive. Petitioner respectfully submits that these allegations are sufficient to survive a Motion to Dismiss, and therefore requests Registrant's motion be denied. In the alternative, and if the Board determines additional allegations are required, Petitioner requests the Board grant leave to amend in order to allow Petitioner to more clearly and fully state its claim under Section 2(d) of the Lanham Act.

Dated May 18, 2015.

/Christopher J. Day/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Response to Registrant's Motion To Dismiss has been served upon all parties, at their following address of record by First Class Mail on May 18, 2015:

Jay H. Geller, Esq.
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/Christopher J. Day/

Christopher J. Day

